UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/50/402
5 September 1995
ENGLISH
ORIGINAL: ARABIC/CHINESE/
ENGLISH/FRENCH/
RUSSIAN/SPANISH

Fiftieth session
Item 144 of the provisional agenda*

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SEVENTH SESSION

Note by the Secretary-General

CONTENTS

		Page
I.	INTRODUCTION	2
II.	DRAFT ARTICLES ON STATE RESPONSIBILITY	3
III.	DRAFT ARTICLES ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW	9

* A/50/150.

95-26988 (E) 130995 180995

/...

I. INTRODUCTION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its statute annexed thereto, as subsequently amended, held its forty-seventh session at its permanent seat at the United Nations Office at Geneva from 2 May to 21 July 1995.

2. The Commission's agenda for its forty-seventh session consisted of the following items:

1. Filling of a casual vacancy.

2. Organization of the work of the session.

3. State responsibility.

4. Draft Code of Crimes against the Peace and Security of Mankind.

5. International liability for injurious consequences arising out of acts not prohibited by international law.

6. The law and practice relating to reservations to treaties.

7. State succession and its impact on the nationality of natural and legal persons.

8. Programme, procedures and working methods of the Commission and its documentation.

9. Cooperation with other bodies.

10. Date and place of the forty-eighth session.

11. Other business.

3. The work of the Commission during its forty-seventh session is described in its report to the General Assembly. 1/ Chapter IV, devoted to "State responsibility", contains a number of articles for inclusion in Parts Two and Three of the draft, which were provisionally adopted by the Commission on first reading. Chapter V concerning "International liability for injurious consequences arising out of acts not prohibited by international law" contains draft articles on general principles which were provisionally adopted by the Commission on first reading.

1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10).

4. For the convenience of the representatives to the fiftieth session of the General Assembly, the draft articles adopted by the Commission at its forty-seventh session under the two above-mentioned topics are reproduced below.

II. DRAFT ARTICLES ON STATE RESPONSIBILITY

Part Two

Content, forms and degrees of international responsibility

Article 13

Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14

Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(a) The threat or use of force as prohibited by the Charter of the United Nations;

(b) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) Any conduct which derogates from basic human rights; or

(e) Any other conduct in contravention of a peremptory norm of general international law.

Part Three

Settlement of disputes

Article 1

Negotiation

If a dispute regarding the interpretation or application of the present draft articles arises between two or more States Parties to the present draft articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 2

Good offices and mediation

Any State Party to the present draft articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 3

Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third-party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the annex to the present draft articles.

Article 4

Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 5

Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the annex to the present draft articles.

2. In cases, however, where the dispute arises between States parties to the present draft articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the annex to the present draft articles.

Article 6

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present draft articles, shall operate under the rules laid down or referred to in the annex to the present draft articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 7

Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with the annex to the present draft articles.

Annex

Article 1

The Conciliation Commission

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present draft articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 3 of Part Three by a request to the Secretary-General, who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

(i) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Article 2

The Arbitral Tribunal

1. The Arbitral Tribunal referred to in articles 5 and 7 (2) of Part Three shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of, a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

III. DRAFT ARTICLES ON INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Article A [6]*

Freedom of action and the limits thereto

The freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited. It is subject to the general obligation to prevent or minimize the risk of causing significant transboundary harm, as well as any specific obligations owed to other States in that regard.

Article B [8 and 9]

Prevention

States shall take all appropriate measures to prevent or minimize the risk of significant transboundary harm.

---

* Articles A, B, C and D deal with general principles. The placement of these articles will be determined once all the articles on the topic have been adopted on first reading.

Article C [9 and 10]

Liability and reparation**

In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give rise to reparation.

Article D [7]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing or minimizing the risk of significant transboundary harm and, if such harm has occurred, in minimizing its effects both in affected States and in States of origin.

** As is clear from the phrase "[i]n accordance with the present articles", the substantive content of this article is left to later elaboration of the articles on liability. At this stage, the article is a working hypothesis of the Commission.